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No. 94-833

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ASARCO INCORPORATED,
Petitioner,
v.
LOUISIANA-PACIFIC CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I. The CERCLA Exclusion For Bevill Wastes.

Respondents urge that the Ninth Circuit's "plain meaning" construction of section 101(14) be upheld – even though it leads to the nullification of subpart (C), an otherwise "absurd result" – because once a court has determined that the statute's "terms are clear," it "need not inquire further." Respondents' Brief in Opposition ("Opp.") at 10. Such a framework cannot survive this Court's recent decision in *United States v. X-Citement Video*, No. 93-723, 1994 U.S. LEXIS 8601 (November 29, 1994), which establishes that a statute's asserted "plain meaning" cannot control where its application would lead to an "absurd result," demonstrably at odds with Congress' intent. In *Eagle-Picher Indus., Inc. v. United States EPA*, 759 F.2d 922 (D.C. Cir. 1985), the D.C. Circuit recognized that the effective nullification of subpart (C)'s exclusion for Bevill wastes would be the type of "irrational result" justifying a departure from section 101(14)'s asserted "plain meaning," if such nullification were established in the record. The Ninth Circuit's decision here is in conflict with that holding.

Respondents also urge that the Ninth Circuit's "plain meaning" construction be upheld because it does not necessarily result in the nullification of subpart (C), and because the legislative history does not unambiguously demonstrate Congress' intention to exclude Bevill wastes from CERCLA regulation, notwithstanding their hazardous constituents. Opp. at 10-11. These arguments, which Respondents advance with considerably less vigor, and which the Ninth Circuit declined to adopt in fashioning its "plain meaning" construction, are simply without basis.

CERCLA is a statute of immense social and economic importance, and the liability issues presented here are recurring ones that this Court has not yet addressed. Asarco's Petition should be granted because it provides this Court with an opportunity further to elucidate the principles governing statutory construction and the circumstances under

which courts must depart from the asserted "plain meaning" of civil statutes, and to resolve the conflict between the Ninth and D.C. Circuits on this issue. At a minimum, this Court should grant Asarco's Petition, vacate the Ninth Circuit's "plain meaning" decision, and remand for reconsideration in light of *X-Citement Video*.

A. This Court's Decision In *X-Citement Video* Confirms That A Statute's Asserted "Plain Meaning" Cannot Govern Where It Would Lead To An Absurd Result.

In *United States v. X-Citement Video*, 1994 U.S. LEXIS 8601 (1994), this Court overturned another Ninth Circuit "plain meaning" decision, which had reversed a conviction under Section 2252 of the Protection of Children Against Sexual Exploitation Act of 1977 (prohibiting the knowing transport or shipping of materials depicting minors engaged in sexual conduct). The Ninth Circuit previously had held, based on the placement of the word "knowingly" at the beginning of Section 2252, that the statute did not require knowledge of the material's prohibited content. In *United States v. X-Citement Video*, 952 F.2d 1285 (9th Cir. 1992), the Ninth Circuit concluded that absent such a scienter requirement, Section 2252 was "facially unconstitutional," violating both the First Amendment's guarantee of free speech and the Fifth Amendment's guarantee of due process. *Id.* at 1292.

This Court reversed, finding that the Ninth Circuit had erred in concluding that the term "knowingly," which appears at the beginning of Section 2252, did not modify the phrase "the use of a minor," which appears further on in the text. 1994 U.S. LEXIS at *9. Although the Court acknowledged that the Ninth Circuit had adopted "the most natural grammatical reading," that was not "the end of the matter." *Id.* at *5. Instead, the Court concluded that the "plain meaning" of Section 2252 could not be deemed to govern where it "would produce results that were not merely odd,

but positively absurd." *Id.* In this regard, the Court noted that under the literal reading of Section 2252 adopted by the Ninth Circuit, any person -- including the mail service -- who knowingly receives mail containing sexually explicit material involving minors may be convicted for violating the statute, even though that person had no knowledge either of the mail's sexual content or the age of the performers. As this Court noted, "we do not assume that Congress, in passing laws, intended such results." *Id.*, citing *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453-55 (1989); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

B. The Ninth Circuit's Purported "Plain Meaning" Construction Of Section 101(14)(C) Must Be Reversed Because It Would Nullify The CERCLA Exclusion For Bevill Wastes -- An Absurd Result Demonstrably At Odds With Congress' Intent.

It was undisputed below that all Bevill wastes contain constituent elements that meet the definition of "hazardous substance" under the remaining subparts of section 101(14). Thus, if the asserted "plain meaning" of section 101(14) -- isolated from its larger context -- is adopted, and the CERCLA exclusion for Bevill wastes limited to subpart (C), that subpart is deprived of all practical effect. Given this showing, the Ninth Circuit should have adopted an alternative reading of section 101(14), which is plausible as a matter of grammatical structure, comports with the statute's legislative history, and gives effect to Congress' expressed intention to exempt Bevill wastes from CERCLA regulation. Pet. at 12-13 & n.6. In *Eagle-Picher*, the D.C. Circuit expressly acknowledged that if it had been demonstrated that all Bevill wastes contain constituent elements qualifying as "hazardous substances" under the remaining subparts of section 101(14), such that a "plain meaning" construction of section 101(14) would lead to "an irrational result that Congress could not have intended," then it would be justified "in departing from the clear language and structure of the statute." Pet. at 13-

14. The Ninth Circuit's decision in this case, adhering to the statute's asserted "plain meaning" despite such an undisputed showing, conflicts with the D.C. Circuit's opinion in *Eagle-Picher*, and cannot be reconciled with this Court's decision in *X-Citement Video*.[1]

Respondents urge that even if all Bevill wastes do contain hazardous constituents, the Ninth Circuit's construction of section 101(14) would not render subpart (C) "meaningless;" rather, it simply would mean that there are no substances that "actually satisfied the theoretical conditions for which Congress provided an exclusion." Opp. at 10. This is an "absurd result" by any other name. As this Court stated in *X-Citement Video*, it cannot be assumed that "Congress, in passing laws, intended such results." 1994 U.S. LEXIS at *5. Indeed, Respondents urged this same argument on appeal, without success. Instead, the Ninth Circuit held that the "plain meaning" of section 101(14) must prevail, even if it were true that such a construction would nullify the subpart

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[1]Respondents cite a string of district court cases, decided both before and after *Eagle-Picher*, that have adhered to the "plain meaning" of section 101(14) in limiting the CERCLA exclusion for Bevill wastes to subpart (C). Opp. at 8. Each decision relies primarily on the placement of the exclusion as determinative; none contains a serious analysis of the nullification issue or the legislative history, and all pre-date this Court's decision in *X-Citement Video*. As previously noted, Pet. at 12 n.6, the one district court that did consider the nullification issue concluded that section 101(14) could not be construed under the "plain meaning" doctrine in a manner that nullifies subpart (C), and that an alternative reading, which gives effect to subpart (C), is both plausible as a matter of grammatical structure, and dictated by the legislative history. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1539 (E.D. Cal. 1992).

(C) exclusion for Bevill wastes altogether. Pet. App. at B-20.

C. The Legislative History Unambiguously Demonstrates Congress' Intention To Exclude Bevill Wastes From CERCLA Regulation Notwithstanding Their Hazardous Constituents.

As the D.C. Circuit recognized in *Eagle-Picher*, the Senate Report conclusively demonstrates Congress' understanding that Bevill wastes contain hazardous constituents, and its intention to exclude those wastes from CERCLA regulation, notwithstanding the presence of such constituents. Pet at 13-14.[2] Respondents do not challenge this conclusion, nor the Senate Report's clear import. Instead, they urge that this legislative history be ignored, in light of the statute's "plain meaning," and they suggest that other legislative history supports the Ninth Circuit's interpretation. Opp. at 11. Neither argument can be sustained. First, given the nullification of subpart (C) effected by the Ninth Circuit's "plain meaning" construction, this legislative history is not only relevant but conclusive on the issue of congressional intent. Second, Respondents'

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[2]The legislative history *also* establishes Congress' understanding that any attempt to regulate the hazardous constituents of Bevill wastes under the remaining subparts of section 101(14) would nullify the subpart (C) exclusion altogether, since all Bevill wastes contain such hazardous constituents. *See* Opp. at 9. Congress repeatedly was advised by EPA that all Bevill wastes contain hazardous constituents. Indeed, the Bevill Amendment was passed in response to EPA's proposed 1978 regulations, which would have left such wastes subject to regulation as RCRA "hazardous wastes," precisely because they contain and can release hazardous constituents. *E.g.*, 126 Cong. Rec. 3349, 3361, 3363 (Statements of Representatives Bevill, Findley and Staggers). The D.C. Circuit did not consider this legislative history in *Eagle-Picher*.

argument "that Congress was aware of the D.C. Circuit's decision in *Eagle-Picher* when it amended CERCLA in 1986, yet it did not amend the statute to override the decision," is both misleading as a matter of fact, and irrelevant as a matter of law. Appellees neglect to mention that there were *two Eagle-Picher* decisions issued on the same day. The references to "*Eagle-Picher*" in the legislative history that Respondents cite, Opp. at 11 n.5, relate to an entirely separate issue -- the validity of EPA's existing Hazard Ranking System ("HRS") for listing sites on the National Priorities List ("NPL"). That issue was the subject of the *first Eagle-Picher* decision, 759, F.2d 905 (D.C. Cir. 1985) (*Eagle-Picher I*), but not the *second Eagle-Picher* decision, 759 F.2d 922 (D.C. Cir. 1985) (*Eagle-Picher II*), which dealt with the CERCLA exclusion for Bevill wastes. Furthermore, the so-called legislative ratification doctrine (that Congress implicitly ratifies a judicial decision it fails to overturn) has been thoroughly debunked by this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989).

II. CERCLA "Arrange For Disposal" Liability

A. The Ninth Circuit Decided As A Matter Of Law That The Sale Of Commercial Byproducts For Productive Use Gives Rise To CERCLA "Arrange For Disposal" Liability.

The Ninth Circuit resolved the "arrange for disposal" issue by fashioning a new rule of law. As the Ninth Circuit noted, Asarco's appeal presented the question whether, under the Seventh Amendment, "the jury's special verdict finding that slag was a "product" for purposes of the Washington Products Liability Act precludes the district court from finding that slag is a 'waste' under CERCLA." Pet. App. at B-21. Although Respondents urged affirmance of the district court's "factual" determination that slag was a "waste," on grounds that such determination was not "clearly erroneous," the Ninth Circuit recognized that the issue presented was a

legal one, and held that slag was a "waste" as a matter of law because it was a "by-product" that Asarco "had to get rid of." Pet. App. at B-22 n.6. It is the Ninth Circuit's adoption of this novel legal rule for determining CERCLA liability that Asarco now challenges.

In an effort to avoid joining issue on this question, Respondents repeatedly allege that Asarco sold its slag in bad faith, and then attempt to convert such allegations into "findings of fact," which Respondents contend were affirmed on appeal. Opp. at 13. However, the district court made no such findings, and the jury specifically rejected Respondents' argument that slag was a "waste" and not a "product," because it had been sold in bad faith; instead, the jury determined that slag was a "product," possessing "intrinsic value," and having been produced "for introduction into trade or commerce." Pet. at 7-8. Given this special verdict, and the Ninth's Circuit's ruling as a matter of law that by-products are inherently "wastes," *regardless* of the uses to which they are put, Respondents' attempt to recast the question presented here as an issue of fact does not withstand scrutiny – as the Ninth Circuit itself recognized.

B. The Ninth Circuit's Decision Conflicts With The Decision Of The D.C. Circuit In *American Mining Congress*.

Respondents attempt to dismiss the conflict with *American Mining Congress v. United States EPA*, 824 F.2d 1177 (D.C. Cir. 1987), by arguing that CERCLA liability turns on the disposal of "hazardous *substances*," not "hazardous wastes." Opp. at 16. This argument proves nothing. Since CERCLA incorporates the RCRA definition of "disposal," which is defined in terms of "solid wastes," CERCLA "arrange for disposal" liability is limited to the

subset of hazardous substances that are "disposed of" as "wastes." Pet. at 21-24.[3]

Thus, the Ninth Circuit's *Asarco* decision does conflict with the D.C. Circuit's decision in *American Mining Congress*. There, the court held that "the scope of EPA's jurisdiction [under RCRA] is limited to those materials that constitute 'solid waste.'" The court carefully examined the statutory definition of "solid waste," as well as the relevant legislative history, and held that the definitional provisions did not authorize EPA to regulate industrial byproducts "'used or reused as effective substitutes for raw materials.'" *Id.* at 1179-80 (quoting 48 Fed. Reg. 14,472, 14,508 (1983)). Although *American Mining Congress* arose under RCRA, the issue presented here is identical because Congress expressly incorporated the relevant RCRA definitions into CERCLA.

C. The Issue Presented Is Important As A Matter Of Policy, Law, And Federalism.

If not overturned by this Court, the Ninth Circuit's *Asarco* decision will seriously discourage the recycling and reuse of commercial byproducts. Under that decision, recyclers of such byproducts must be concerned that once those byproducts enter the stream of commerce, any event that ultimately causes the release of a hazardous constituent could lead to joint and several CERCLA liability -- even though the byproducts were not "disposed of" at the time they were recycled. Given this prospect, manufacturers may well

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[3]In *Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994), the Ninth Circuit reaffirmed that "the term 'disposal' [in CERCLA] necessarily includes the concept of 'waste'," because CERCLA incorporates the RCRA definitions of "disposal" and "solid waste." *Id.* at 750 (quoting *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1361-62 (9th Cir. 1990)). The *Asarco* court also framed the issue as whether the slag sold to Respondents was "disposed of" as a "waste," within the meaning of CERCLA. Pet. App. at B-21.

determine that it is safer to dispose of their byproducts in a landfill, rather than recycling them for productive use. *See* Brief of *Amici Curiae* American Petroleum Institute, National Association Of Chemical Recyclers, National Association Of Printing Ink Manufacturers, And National Paint And Coatings Association In Support Of Granting The Petition. Such an incentive significantly undermines Congress' directive that a national policy be established "encouraging . . . materials reuse [and] properly conducted recycling and reuse. . . ." 42 U.S.C. § 6902(a)(6).

The question presented is also important legally, not only because of the conflict between *Asarco* and *American Mining Congress*, but because of the confusion prevailing in the federal judiciary over the proper test governing "arrange for disposal" liability. As Respondents' own brief makes clear, Opp. at 14-15, the federal courts have approached this issue in an ad hoc manner, with no clear delineation of a unifying legal test. *See* Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA liability: What is "Arranging for Disposal"?*, 23 Ariz. St. L.J. 445, 461 (1991).[4]

Finally, because the Ninth Circuit's decision upsets the careful balance between state and federal regulation struck by Congress in CERCLA, the Petition raises important issues of federalism. CERCLA was intended as a supplement to, rather than a replacement for, state law. 42 U.S.C. § 9652(d); S. Rep. No. 848, 96th Cong., 2d Sess. 38 (1980).

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[4]Respondents' reference to the Fourth Circuit's holding in *Owen Elec. Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994), Opp. at 16, underscores this point. The *Owen* court recognized that, under *American Mining*, Owen's slag "cannot be said to have been discarded" because it "is *eventually* recycled." *Id.* at 149 (emphasis in original). The *Owen* court then fashioned its own test for CERCLA liability, holding that the sale of a slag by-product is a "waste disposal" because the by-product was not (i) immediately recycled (ii) for use in the same industry. *Id.* at 150.

All states have well-developed bodies of law governing products liability, which reflect important policy choices concerning the allocation of risk among manufacturers, sellers, and purchasers. Many states also have enacted statutes specifically aimed at encouraging and regulating recycling. Such laws have now been supplanted under the Ninth Circuit's ruling, to a degree never envisioned by Congress. CERCLA, after all, reflects Congress' carefully-limited decision to federalize only certain rights and remedies – leaving the states free to regulate in all other areas.

Decisions such as *Asarco* pose a danger to federalism that often goes unnoticed. The risks when Congress usurps state power lie in "the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." Lawrence H. Tribe, *American Constitutional Law*, §§ 5-20, at 381 (1988). Here, the shift in power has been effected by the Ninth Circuit Court of Appeals rather than by Congress, but it is no less significant.

III. Conclusion

For these reasons, Asarco urges that its Petition be granted.

Respectfully submitted this 13th day of December, 1994.

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